

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

PERIODIC REPORTING)
(PROPOSALS SIXTEEN THROUGH) Docket No. RM2012-2
TWENTY))

**MOTION OF GAMEFLY, INC.,
TO CLARIFY ORDER NO. 1053
AND FOR SUPPLEMENTAL RELIEF
(December 20, 2010)**

GameFly, Inc. (“GameFly”) respectfully requests that the Commission clarify Order No. 1053 (issued December 16, 2011), by explicitly marking the November 30 version of the Postal Service’s petition for rulemaking—the subject of GameFly’s December 7 motion to strike—as withdrawn, stricken, or physically expunged from the record. *We also request that the Commission keep the November 30 version of the petition for rulemaking under seal while this motion is pending.* These actions are necessary to give effect to the stated intent of Order No. 1053: to “provide[] GameFly with the relief that it request[ed]” in its motion to strike. Order No. 1053 at 2.

GameFly moved on December 7 to strike the offending portions of the Postal Service petition not just because (1) the material included a sentence that improperly disclosed commercially sensitive information about GameFly,¹ but also because (2) the sentence, and the lengthy footnote appended to it, were

¹ USPS Petition at 33-34 (carryover sentence); GameFly Motion to Strike at 6-8.

irrelevant to the costing issues raised in the Petition for Rulemaking,² and (3) the Postal Service's submission of the material was an improper attempt to relitigate issues resolved in Docket No. C2009-1, *Complaint of GameFly, Inc.*³

The Postal Service, in its December 13 response to the motion to strike, offered a cursory response to the first ground of GameFly's motion,⁴ and no response at all to the second and third grounds. Instead, the Postal Service announced that it was filing "an alternate version of the Petition that excludes the statements objected to by GameFly." USPS Response (December 13, 2011) at 2. The Postal Service filed an expurgated version of its Petition with the Commission on the same day.

² GameFly Motion to Strike at 2-3.

³ *Id.* at 3-6.

⁴ The Postal Service argued that (1) it is the only person with standing to invoke 39 U.S.C. § 410(c)(2), and (2) the disclosure did not violate 39 U.S.C. § 412(a) because GameFly's "name and status as a postal patron" were already public knowledge. Both arguments are completely without merit.

First, the Commission has made clear in Part 3007 of its rules that "third parties" have independent standing to object to public disclosure of proprietary information about them, and that the Postal Service has an affirmative obligation to inform third parties *and the Commission* that the Postal Service is contemplating disclosure of potentially proprietary information about third parties, so that they may "address" their "confidentiality concerns directly with the Commission." 39 C.F.R. § 3007.20(b) and (c); *id.*, § 3007.21(c)(2); *id.*, 3007.22; *id.*, 3007.40(b) and (d)(2).

Second, while GameFly's "name and status as a postal patron" were certainly public before November 30, 2011, GameFly's ranking as a user of non-letter shape BRM was not. This kind of volume-related information is clearly proprietary. Motion to Strike at 6-7 (citing Postal Service pleadings).

Three days later, the Commission dismissed the motion to strike as “moot.” Order No. 1053 at 2 and 7. The “Postal Service,” the Commission explained, “has voluntarily provided GameFly with the relief that it requests.” *Id.* at 2.

In fact, GameFly has received *none* of the relief that it requested. While the Postal Service’s December 13 response might be read to suggest that the Postal Service would withdraw the original version of its petition, the Postal Service did in fact not do so. Likewise, while Order No. 1053 might be read to suggest that the Commission would expunge the original version of the petition from the Commission’s docket, or mark it as voluntarily withdrawn or stricken, the Commission has not done so. The result is that the original version of the petition remains in the Commission’s docket, available for use by the Postal Service at any time in other cases, for whatever purposes motivated the Postal Service to file the material in the first place. Moreover, the original unredacted version of the petition remains on the public section of the Commission’s website, available to be viewed and downloaded by anyone in the world.

To accomplish the apparent intent of the Commission in Order No. 1053, GameFly requests that the Commission take two additional steps. First, the original, November 30, version of the petition should be either marked in a clear, unambiguous and ineradicable manner on each page as “stricken” or “withdrawn,” as the Commission has done in previous dockets, or physically expunged outright. This step is necessary to prevent the disputed material from being cited by any party in the future. Merely keeping the material under seal is

an insufficient remedy: a party could still use the material in another proceeding by filing a derivative pleading or testimony under seal.

The Postal Service has no basis for objecting to this relief. The Postal Service, in its December 13 response to the motion to strike, did not dispute that the material at issue was unnecessary to support the Postal Service's position in this docket, irrelevant and immaterial to any issue in this docket, and unnecessary to protect the Postal Service's legitimate interests in any other docket.

Second, the Commission should place the November 30 version of the petition under seal pursuant to 39 C.F.R. § 3007.22 while this motion is pending. The confidential treatment should remain permanently in effect if the Commission elects to mark the disputed portions of the November 30 petition as withdrawn rather than expunging the entire document outright.

As the Postal Service itself has acknowledged, information that knowledgeable persons could use to infer customers' volume, and—in particular—information about customers' incoming BRM volume—are commercially sensitive. See, e.g., Docket No. A2011-1, *In the Matter of: East Akron Station, Akron, OH 44305*, USPS Notice of Filing and Application for Non-Public Status (June 17, 2011); Docket No. C99-1, *Complaint on Post E.C.S.*, USPS Answer in Opposition to UPS Motion to Compel Answers to Interrogatories UPS/USPS-25-33 (July 6, 1999); Docket No. R2008-1, *Notice of Price Adjustment*, Notice of the USPS of Filing of USPS-R2008-1/NP2 (March 13, 2008) at 1 (noting “consensus” about the “danger of public disclosure” of

information that “knowledgeable observers” could use to “draw reasonable inferences and thereby identify at least some of the publications and their confidential [volume and postage] data”); Docket No. MC99-2, *Classification and Fees for Weight-Averaged Nonletter-Size Business Reply Mail, 1999*, Motion of the USPS Requesting Protective Conditions for Workpaper I of Witness Leslie Schenk (March 10, 1999) (moving to keep customer-specific incoming BRM volume information under seal).

Respectfully submitted,

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